No. 3994

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. ALLEN RISPIN,
Plaintiff in Error,

vs.

THE MIDNIGHT OIL COMPANY
(a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

DANA, BLOUNT & SILVERSTEIN,
DUDLEY D. SALES,
Holbrook Building, San Francisco,
Attorneys for Defendant in Error and Petitioner.

No. 3994

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. ALLEN RISPIN,
Plaintiff in Error,

vs.

THE MIDNIGHT OIL COMPANY
(a corporation),
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Application and petition of defendant in error for a rehearing in the above entitled action respectfully shows:

That judgment was pronounced in said cause by the United States Circuit Court of Appeals for the Ninth Circuit on the 6th day of August, 1923, reversing the judgment of the District Court of the United States in favor of defendant in error and against plaintiff in error.

That the judgment pronounced by this honorable Court is erroneous in this:

FIRST: That the contract in suit between plaintiff in error and defendant in error is not a contract of guaranty.

SECOND: That defendant in error was under no obligation to deliver the possession of the real property in question to Associated Oil Company and therefore a failure on the part of defendant in error to deliver said possession did not put defendant in error in default.

THIRD: The allegation in the answer of plaintiff in error that defendant in error suffered no actual damage by the failure to drill the oil well, as agreed, presented no issue as the contract in suit showed upon its face that it was a proper case for the parties to stipulate the damages which would result from a breach.

Guaranty?

By the contract in suit plaintiff in error agreed that the Associated Oil Company would drill the oil well in question and that he would pay the sum of Ten Thousand Dollars as liquidated damages if the Associated Oil Company *for any cause* failed to drill the said oil well, as agreed. The Associated Oil Company failed to drill the well. Plaintiff in error in his answer alleges A CAUSE for said

failure, namely, BECAUSE defendant in error failed to place the Associated Oil Company in possession of the property to be drilled. This Honorable Court holds THIS CAUSE sufficient to relieve plaintiff in error from his positive agreement to pay the stipulated sum. In other words the parties to the contract agreed that NO CAUSE would excuse plaintiff in error from his obligation to pay the stipulated sum if the Associated Oil Company failed to drill the well. This Honorable Court by construction changes the contract actually made by the parties to read in effect that NO CAUSE will excuse plaintiff in error from paying the stipulated sum EXCEPT FAILURE OF DEFENDANT IN ERROR TO PLACE THE ASSOCIATED OIL COMPANY IN POSSESSION OF THE PROPERTY, EXCEPT FAILURE OF THE HOPEWELL OIL COMPANY TO PLACE THE ASSOCIATED OIL COMPANY IN POSSESSION OF THE PROPERTY AND EXCEPT ALL THE OTHER CAUSES WHICH WILL RELIEVE A GUARANTOR FROM HIS OBLIGATION UNDER A GUARANTY.

If the contract in suit is a guaranty of the operating contract between the Associated Oil Company and the Hopewell Oil Company, as held by this Honorable Court, failure of the Hopewell Oil Company to place the Associated Oil Company in possession of the property to be drilled would release the guarantor, for by the terms of said operating contract the Hopewell Oil Company agreed to place the Associated Oil Company in possession; but attention is invited to the fact that the terms

of the operating contract *imposed no obligation or duty on defendant in error to place the Associated Oil Company in possession* for defendant in error was not a party to the said operating contract, nor was it even mentioned or referred to therein. It follows that even granting that the contract in suit was one of guaranty a failure on the part of defendant in error to perform the terms of the contract guaranteed would not release the guarantor.

But defendant in error does not grant that the contract in suit is one of guaranty, but on the contrary contends that it is an independent agreement and a primary obligation. If the contract in suit is a guaranty the guarantor would be relieved from all liability if the Hopewell Oil Company extended the time for the Associated Oil Company to drill the well. Yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. If the contract in suit is a guaranty the guarantor would be released if the Hopewell Oil Company in any manner materially altered the terms of its operating contract with the Associated Oil Company; yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. If the contract in suit is a guaranty the guarantor

would be released under certain circumstances if the operating contract guaranteed was illegal or void; yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. Defendant in error submits that it readily appears from the foregoing analysis that the express terms of the said contract between plaintiff in error and defendant in error are positively inconsistent with the claim that the said contract is a contract of guaranty. Defendant in error further contends that to even plausibly contend that the contract in suit is a guaranty the provision that plaintiff in error was to pay the stipulated sum if FOR ANY CAUSE the Associated Oil Company failed to drill the well must be stricken out of the contract, or entirely disregarded.

> "There can only be a contract of guaranty where there is some principal or substantive liability to which it is collateral. The chief characteristic of a guaranty being that it is collateral to some other contract or duty." 20 Cyc., page 1397.

The contract in suit is not collateral. It does not purport to guarantee the performance of some principal or substantive liability. It does not purport to guarantee the performance of some other contract or duty. By its terms plaintiff in error does not agree "or guarantee" that the Associated Oil Company will perform its contract with the

Hopewell Oil Company. By its terms it does not agree or guarantee that the Associated Oil Company will perform any obligation which it had to the Hopewell Oil Company. It is true, the Associated Oil Company was bound, *upon the conditions set forth in the operating contract,* to drill the oil well in question, but plaintiff in error agreed with defendant in error that the Associated Oil Company would drill the well *without any conditions attached to the obligation.* In other words plaintiff in error did not agree with defendant in error that the Associated Oil Company would drill the well provided that the Hopewell Oil Company lived up to its contract with the Associated Oil Company. Yet so far as the obligation of the Associated Oil Company to the Hopewell Oil Company is concerned that obligation is conditioned upon the Hopewell Oil Company placing the Associated Oil Company in possession of the property to be drilled and performing the other terms and conditions of the operating contract on the part of the Hopewell Oil Company to be performed. If plaintiff in error had agreed with defendant in error that the Associated Oil Company would perform its contract with the Hopewell Oil Company or would perform some duty or obligation which it had to the Hopewell Oil Company the said agreement would have been collateral to that contract or obligation and hence a guaranty, but defendant in error merely agreed that the Associated Oil Company would drill the well in question with no

reference to any contract or obligation of the Associated Oil Company to drill the well. If the parties had intended that plaintiff in error was to become obligated only to the extent that the Associated Oil Company was obligated under its contract with the Hopewell Oil Company it would have been a simple matter to employ words to indicate such intention. The outstanding fact in this connection is that no such words were employed. The words actually employed are consistent only with an independent agreement on the part of plaintiff in error that the Associated Oil Company would drill the well in question with no excuses for non-performance. The fact that the word "guaranty" was used is not at all conclusive that the parties intended that their contract was to be a guaranty. There are many cases in which the Courts have construed contracts in which the word guaranty was used to be independent and primary obligations.

5 Cyc. 1398;
Kernochan v. Murray, 111 N. Y. 306;
Manning v. Alger, 78 Iowa 185;
Sherman v. Roberts, 1 Grant (Pa.).

Whether the contract in review is a collateral or independent obligation must be determined by an examination of the entire contract.

5 Cyc. 1398.

Obligation, if Any, of Midnight Oil Company.

Plaintiff in error alleged in paragraph III of his answer that on May 12, 1919, the Hopewell Oil Company assigned to the Midnight Oil Company, defendant in error herein,

> "All of the *royalties and benefits* accrued or thereafter accruing to said Hopewell Oil Company from said Associated Oil Company by virtue of said contract referred to in paragraph II above by an instrument in writing, a copy of which is attached hereto and marked Exhibit C and is hereby made a part hereof."

Referring to Exhibit C it appears that the foregoing allegation is true, namely: That the Hopewell Oil Company did assign the *royalties and benefits* accruing from said contract to the Midnight Oil Company. It is particularly important to note in this connection that the Midnight Oil Company by said assignment did not agree to assume any of the obligations of the Hopewell Oil Company imposed upon the Hopewell Oil Company by its said contract with the Associated Oil Company. In other words the Midnight Oil Company, defendant in error herein, did not expressly agree by said assignment to place the Associated Oil Company in possession of the property in question for the purpose of drilling thereon or at all. If it did not expressly agree to place the Associated Oil Company in possession was there an implied agreement to do so? Defendant in error submits that there was no such implied agreement. The Hopewell Oil Company merely assigned to defendant in error the royalties and benefits accruing to it by virtue

of its contract with the Associated Oil Company. An assignment of royalties and benefits to accrue from a contract does not impose upon the assignee the burden of performing the obligations of said contract.

5 Corpus Juris, pp. 976-977;
Levalle v. U. S. Gordon, 15 Mont. 515;
Gammel Book Co. v. Paine, 75 Nebr. 683;
Suydam v. Duton, 84 Hun. 506;
National Surety Co. v. Macy, 43 Ind. A. 16, 86 M. E. 862.

The said assignment to the defendant in error was expressly made subject to the said operating contract between the Hopewell Oil Company and the Associated Oil Company. Defendant in error contends that the legal effect of such provision in the assignment does not impose upon the assignee the obligations of the assignor, or, in other words, that defendant in error, as assignee of the royalties and benefits accruing under the so-called operating contract, did not become obligated to perform the conditions of said contract on the part of the assignor, namely the Hopewell Oil Company, to be performed.

Consolidated Coal Co. v. Peers (Ill.) 38 L. R. A. 624;
Patton v. Adkins, 42 Ark. 197;
Commercial Bank of Madera v. Redfield, 122 Cal. 405;
King v. Israel, 43 N. Y. Supp. 306;
Levalle v. Gordon, 15 Mont. 515.

It is significant that the said assignment in express terms imposes upon defendant in error herein the obligation of performing the terms and conditions of *the lease between the Hopewell Oil Company* and the *Western States Oil & Land Company,* but does not in express terms impose upon defendant in error the obligations of performing the terms and conditions of the operating contract between the Hopewell Oil Company and the Associated Oil Company. The language of the assignment is as follows:

> "To have and to hold by the said Midnight Oil Company, its successors and assigns, subject however to all the terms, conditions, agreements, covenants and royalties expressed in said *lease* which said TERMS, CONDITIONS, AGREEMENTS and ROYALTIES the Midnight Oil Company agrees to KEEP, PERFORM AND PAY SO FAR AS IT RELATES TO THE ABOVE DESCRIBED LAND ASSIGNED TO IT AND SUBJECT TO SAID OPERATING CONTRACT AS TO ALL OF THE TERMS, CONDITIONS, AGREEMENTS AND COVENANTS therein contained."

It seems only fair to assume that if the parties to said assignment had intended that the Midnight Oil Company was to be obligated to perform the terms and conditions of the operating contract as well as the terms and conditions of the lease they would have so provided.

The lease between the Western States Oil & Land Company and the Hopewell Oil Company of course made no reference to the said operating contract. It follows therefrom that an agreement on the part of the Midnight Oil Company to perform

the terms and conditions *of said lease* did not impose upon the Midnight Oil Company the obligation of performing the terms and conditions of the *said operating contract*. If defendant in error is correct in the position that it has taken that the assignment to it by the Hopewell Oil Company of the *benefits and royalties* accruing from the operating contract and the assignment *of the lease* between the Western States Oil & Land Company and the Hopewell Oil Company and the agreement to perform terms and conditions of said lease did not impose upon defendant in error the obligation of placing the Associated Oil Company in possession of the lands in question for the purpose of drilling thereon, it follows that defendant in error having no obligation to do so was not in default when it failed to place the Associated Oil Company in possession of the said real property. However in any event the said operating contract was not a part of the contract between plaintiff in error and defendant in error. It follows that whether or not, as between the Associated Oil Company and defendant in error, defendant in error was obligated to place the Associated Oil Company in possession of the property, plaintiff in error, by virtue of his said contract with defendant in error, would have no right to rely upon the failure of defendant in error so to do. The contract between plaintiff in error and defendant in error is a primary and independent contract and unless defendant in error failed to perform its terms on his part to be per-

formed plaintiff in error has no right to complain. Even though defendant in error had expressly agreed to perform the terms of the operating contract, said express agreement would not thereby become the contract the performance of which plaintiff in error is claimed to have guaranteed. How then would a breach of its agreement release plaintiff in error who is claimed to have guaranteed the performance of another contract, namely, the operating contract.

Liquidated Damages.

This Honorable Court in its decision herein lays down the rule that granting that the contract in suit must be read as for liquidated damages it will not be enforced if it appears that do damage whatever has been sustained. If this rule is to prevail what becomes of the great weight of authority which holds that where the parties in their contract have properly provided for liquidated damages the question of actual damage is not an issue? In the case of *Woods v. Niagara Falls Paper Company,* 121 Fed. 818, defendant attempted to prove that plaintiff sustained no actual damage. The trial Court excluded all such evidence, which ruling was sustained upon appeal. The Wood case was fully supported by

Sun Publishing Company v. Moore, 163 U. S. 682;

Bosch Magneto Company v. Rushmore, 255 Fed. 465;
Gibson v. Oliver, 25 Atl. Rep. 961;
Springer v. Citizens Gas Company, 22 Atl. Rep. 986;
17 Corpus Juris, 965.

The above mentioned rule laid down by this Honorable Court simply means the question of actual damage is an issue in every case whether the case be one to recover a penalty or liquidated damages. Evidence that no damage had been sustained would be material in all such cases where defendant had alleged or put in issue the question of actual damage.

The case of *Northwestern Fixture Company v. Kilborne,* 158 Fed. 256, we respectfully submit does not uphold the rule laid down by this Honorable Court in its decision herein, as in said case the Court actually construed the contract in review to provide for a penalty and not liquidated damages. Said Court did not hold that the contract in review was a contract properly providing for liquidated damages and that the question of actual damage was not an issue. In the case of *The Columbia,* 997 Fed. 661, the decision was based upon the meaning of the word demurrage. It was not a case involving a question of liquidated damages.

We respectfully submit that the great weight of authority lays down the following rule in respect

to liquidated damages and that such rule should be followed in the case at bar, namely: That it shall first be determined by the Court whether or not the nature of the contract is such that it was proper for the parties to stipulate their damages; that if this question be determined in the affirmative that the question of actual damage is irrelevant as it is not an issue and can not be made such by the mere allegation that no actual damage has been sustained.

Wherefore defendant in error prays that its application for a rehearing be granted.

Dated, San Francisco,
September 1, 1923.

DANA, BLOUNT & SILVERSTEIN,
DUDLEY D. SALES,
Attorneys for Defendant in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I do hereby certify that I am of counsel for defendant in error and petitioner in the above entitled action and that in my judgment the foregoing petition for a rehearing is well-founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 1, 1923.

DUDLEY D. SALES,
Attorney for Defendant in Error and Petitioner.